STATE OF MICHIGAN

COURT OF APPEALS

TORGER G. OMDAHL,

Plaintiff-Appellant,

v

WEST IRON COUNTY BOARD OF EDUCATION, ROBERT HAN, M.D., JAMES QUAYLE, DONALD AUTIO, JAMES BURKLAND, ERIC MALMQUIST, BETH VESSETTI and CHRISTINE SHAMION,

Defendants-Appellees.

FOR PUBLICATION
July 13, 2006
9:00 a.m.

No. 262532
Iron Circuit Court
LC No. 04-003070-CZ

Official Reported Version

Before: Sawyer, P.J., and Kelly and Davis, JJ.

KELLY, J. (*concurring in part and dissenting in part*).

Although I agree with the majority that the trial court erred in denying plaintiff 's request for costs, I would affirm the trial court's denial of plaintiff 's request for attorney fees. The plain language of the Open Meetings Act (OMA), MCL 15.261 *et seq.,* does not permit plaintiff, an attorney who proceeded in propria persona throughout this litigation, to recover attorney fees not actually incurred. MCL 15.271(4).

This case presents an issue involving statutory interpretation. The proper interpretation of a statutory provision is a question of law that this Court reviews de novo. *Lincoln v Gen Motors Corp,* 461 Mich 483, 489-490; 607 NW2d 73 (2000). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes,* 470 Mich 661, 665; 685 NW2d 648 (2004). The words of the statute provide the most reliable evidence of legislative intent. *Id.* Accordingly, nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself. *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 63; 642 NW2d 663 (2002). "Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory. Further, we give undefined statutory terms their plain and ordinary meanings. In those situations, we may consult dictionary definitions." *Koontz v Ameritech Services, Inc,* 466 Mich 304, 312; 645 NW2d 34 (2002) (citations omitted).

Under MCL 15.271(4), attorney fees are to be awarded as follows:

> If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

In my opinion, the issue whether the trial court erred in denying plaintiff's request for attorney fees pursuant to MCR 15.271(4) turns on the phrase "*actual* attorney fees for the action." Our Supreme Court recently recognized that the word "actual" means "existing in act, fact, or reality; real." *People v Yamat*, 475 Mich 49, 54 n 15; 714 NW2d 335 (2006), quoting *Random House Webster's College Dictionary* (1997). Plaintiff has failed to demonstrate that the attorney fees he seeks existed in act, fact, or reality. Plaintiff has instead demonstrated that he spent his own time and effort prosecuting this case. And although Abraham Lincoln recognized the value of a lawyer's "time and advice," the OMA does not provide for a recovery of this time or effort. While I agree with the majority's assertion that "actual attorney fee" does not necessarily or exclusively mean "an actual, physical bill from a law firm or the actual payment of a fee by a client to his attorney," I suggest that determining whether "actual attorney fees" were incurred would include a consideration of both of these things, and may, in some circumstances, include more.[1]

The majority opinion focuses on whether other cases, addressing other statutes or court rules, have allowed an award of attorney fees when the prevailing party acted in propria persona. However, according to the well-established rules of statutory construction, if the language of the statute is clear, judicial construction is not permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). Thus, any reliance on other cases addressing other statutes or court rules is inappropriate. Furthermore, the issue is not whether an attorney acting in propria persona who succeeds in obtaining relief under the OMA is entitled to attorney fees. The issue is rather whether plaintiff incurred actual attorney fees for this action.

The plain language of MCL 15.271(4), aside from being unambiguous and, therefore, not subject to construction, resolves several of the majority's concerns. First, the majority notes that it cannot know whether the Legislature "had an opinion regarding whether or not to 'subsidize attorneys without clients.'" *Ante* at ___. I agree that the Legislature's opinion in this regard cannot be known. However, it is a well-established rule that courts may not speculate about the probable intent of the Legislature beyond the language expressed in the statute. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Because the statute requires that

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[1] To take the example presented by the majority, if an attorney employed a ruse such as naming his or her secretary as the plaintiff, the trial court, upon demonstration of this fact, might conclude that the plaintiff secretary did not incur "actual attorney fees." Under such circumstances, whether the attorney actually generated a bill or the secretary actually received or paid the bill would only be part of the inquiry. The ultimate dispositive inquiry would be whether the plaintiff secretary incurred actual liability for fees actually owed.

attorney fees actually be incurred, we need not speculate whether the Legislature, in writing the OMA, intended to subsidize attorneys without clients.

The majority also expresses concern that the general rule precluding attorneys acting in propria persona from recovering attorney fees might (1) include attorneys who prosecute claims in which they *do* have a personal interest and (2) be inadequate to prevent attorneys from seeking out cases solely to recover fees. Even if these were considered legitimate concerns regarding this general rule, this general rule is nowhere found in the OMA and, therefore, these concerns are absolutely irrelevant to the analysis in this case. The OMA simply requires that "actual attorney fees" be incurred for the action before they can be recovered by a prevailing party.

Finally, in response to the majority's question "Why should an attorney who chooses to represent himself or herself not be awarded a fee upon prevailing?", *ante* at ___; I answer that the appropriate question in this case is not whether the attorney "should," as a matter of public policy; rather, the question is whether the OMA permits the attorney to recover attorney fees not actually incurred as required by the plain language of the statute. Because plaintiff has failed to demonstrate that he actually incurred any attorney fees under MCL 15.271(4), he has no actual attorney fees to recover. The majority's conclusion that plaintiff should nonetheless be awarded attorney fees inappropriately reads into the statute an equitable provision that does not exist. I would affirm the trial court's denial of plaintiff 's request for attorney fees.

/s/ Kirsten Frank Kelly